Mohd Karim bin Abas & Ors v Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO A-01(NCVC)(A)-388–09 OF 2012
ZAHARAH IBRAHIM, MOHAMAD ARIFF AND HAMID SULTAN JJCA
4 MARCH 2013

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Civil Procedure — Appeal — Decision of trial judge — Application for leave to apply for judicial review and obtain order of certiorari and/or mandamus refused by High Court — Application to be registered as in-house union — Whether judge acted within jurisdiction — Whether frivolous, vexatious and abuse of process of court — Trade Unions Act 1959 s 12(2)

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The present appeal stemmed from the High Court's refusal of the appellants' application for leave to apply for judicial review and obtain an order of certiorari and/or mandamus. Employees Union of Carsem (M) Sdn Bhd ('the union') applied to the respondent to be registered as an in-house union. The application was postponed by the respondent until the disposal of an application for the recognition by the *Kesatuan Sekerja Industri Elektronik Wilayah Barat Semenanjung Malaysia*. By virtue of s 12(2) of the Trade Unions Act 1959 ('the Act'), the Director General may refuse to register a trade union when there existed a trade union representing the workmen. The appellant could appeal to the Minister should they be dissatisfied with the respondent's decision. In the present appeal, the appellants contended that that the learned High Court judge acted beyond his jurisdiction when he considered the merits of the case at the leave stage; the learned High Court judge decided that there was no decision made amounted to having gone to the merits of the case and the issue and that issue could only be dealt with at inter parte stage; the Director General could only make one of two decisions under s 12(1) of the Act or refuse to register under the said section and had no provision to defer the decision, until the claim for recognition by another union was resolved; the Director General had taken into account an irrelevant consideration because the claim for recognition by the other union had nothing to do with the registration of the in-house union.

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Held, dismissing the appeal with costs:

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(1) It is trite that judicial review is nothing but a potent and effective procedural device within the armory of the High Court to supervise and control the decision-making process of public bodies or alike to ensure that they act within the spirit and powers of the Federal Constitution

and/of statutes and if necessary to restrain the decision-maker from acting in excess and/or abuse of power. This process was also used to check and arrest executive excesses and encroachment (see para 10(a)).

(2) The courts have placed various restrictions to control exodus of complaints against public bodies by busy bodies and alike, or where the complaint was premature or trivial or misconceived. If judicial fetters were employed, it was only for the purpose of stopping busy bodies or premature claims, which ultimately could not be given any form of relief and from disturbing the courts and the workings of the government and public bodies. And no one case was binding on another for courts intervention when the issue related to fundamental guarantees and/or public interest as a whole. It all depended on the factual matrix of the case, public interest and urgency for the courts' intervention even though there might be room to argue that intervention might be premature. Furthermore, failure to make decision by public bodies within a reasonable time might be a subject matter of judicial review (see para 10(a) & (b)).

(3) The instant case was one which will fell within jurisprudence of frivolous, vexatious and abuse of process of court, for in the instant case no decision had been made; the applicants have not demonstrated in the affidavit of the prejudice for failure to have the decision made promptly; there was no reason given why appeal mechanism provided under the Act had not been complied with (see para 10(c)).

[Bahasa Malaysia summary

Rayuan ini berpunca daripada penolakan Mahkamah Tinggi terhadap permohonan perayu-perayu untuk izin memohon semakan kehakiman dan memperolehi perintah certiorari dan/ atau mandamus. Employees Union of Carsem (M) Sdn Bhd ('kesatuan') memohon kepada responden untuk didaftarkan sebagai kesatuan dalam syarikat. Permohonan ditangguhkan oleh responden sehingga pendengaran permohonan untuk pengiktirafan oleh Kesatuan Sekerja Industri Elektronik Wilayah Barat Semenanjung Malaysia. Mengikut s 12(2) Akta Kesatuan Sekerja 1959 ('Akta'), Ketua Pengarah boleh menolak untuk mendaftar kesatuan sekerja apabila wujud kesatuan sekerja yang mewakili pekerja-pekerja. Perayu boleh merayu kepada Menteri jika mereka tidak berpuas hati dengan keputusan responden. Dalam rayuan ini, perayu-perayu berhujah bahawa hakim Mahkamah Tinggi yang bijaksana bertindak melampaui bidang kuasanya apabila beliau mempertimbangkan merit kes pada peringkat izin; hakim Mahkamah Tinggi yang bijaksana memutuskan bahawa tidak terdapat keputusan dibuat merujuk kepada merit kes dan isu dan isu tersebut hanya boleh diuruskan pada peringkat inter parte; Ketua Pengarah hanya boleh membuat satu daripada dua keputusan di bawah s 12(1) Akta atau untuk mendaftar di bawah seksyen tersebut dan tidak mempunyai peruntukan untuk menangguhkan keputusan tersebut, sehingga

tuntutan untuk pengiktirafan oleh kesatuan lain diputuskan; Ketua Pengarah telah mengambil kira pertimbangan yang tidak relevan kerana tuntutan untuk pengiktirafan oleh kesatuan yang lain tidak ada kena mengena dengan pendaftaran kesatuan dalam syarikat tersebut.

Diputuskan, menolak rayuan dengan kos:

(1) Adalah nyata bahawa semakan kehakiman hanya alat prosedur yang kuat dan berkesan dalam senjata Mahkamah Tinggi untuk mengawasi dan mengawal proses pembuatan keputusan badan awam atau yang sama dengannya untuk memastikan bahawa ia bertindak dalam kekuatan dan kuasa Mahkamah Persekutuan dan/atau statut dan jika perlu untuk menghalang pembuat keputusan daripada bertindak berlebihan dan/atau menyalah guna kuasa. Proses ini juga digunakan untuk memeriksa dan menahan eksekutif berlebihan dan pencerobohan (lihat perenggan 10(a)).

(2) Mahkamah telah meletakkan pelbagai sekatan untuk mengawal penghijrahan aduan terhadap badan-badan awam oleh orang-orang yang suka masuk campur dan yang serupa dengannya, atau di mana aduan tersebut adalah pra-matang, remeh atau salah tanggap. Jika kebelengguan kehakiman digunakan, ia hanya bagi tujuan memberhentikan orang-orang yang suka masuk campur atau tuntutan-tuntutan pra-matang, yang mana akhirnya tidak dapat diberikan apa-apa bentuk relief dan daripada menganggu mahkamah dan perjalanan kerajaan dan badan-badan awam. Tiada kes yang mengikat ke atas yang lain untuk campur tangan mahkamah apabila isu berkaitan kepada jaminan asas dan/atau kepentingan awam sebagai keseluruhannya. Kesemuanya bergantung ke atas matriks fakta kes, kepentingan awam dan tindakan segera campur tangan mahkamah walaupun terdapat ruang untuk berhujah bahawa campur tangan tersebut mungkin pra-matang. Selanjutnya, kegagalan untuk membuat keputusan oleh badan-badan awam dalam masa yang munasabah mungkin menjadi perkara semakan kehakiman (lihat perenggan 10(a) & (b)).

(3) Kes ini adalah satu yang terangkum dalam jurisprudens remeh, menyusahkan dan penyalahgunaan proses mahkamah, kerana dalam kes ini tiada keputusan dibuat; pemohon-pemohon tidak menunjukkan di dalam afidavit mengenai prejudis kerana gagal untuk membuatkan keputusan dibuat dengan segera; tidak alasan yang diberikan mengapa mekanisme rayuan yang diperuntukkan di bawah Akta tidak dipatuhi (lihat perenggan 10(c)).]

Notes

For cases on decision of trial judge, see 2(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1002–1005.

Cases referred to

Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor [2008] 6 MLJ 704, CA (refd)

Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association [1990] 3 MLJ 228, SC (refd)

Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor [1998] 1 MLJ 224, HC (refd)

Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors [2007] 5 MLJ 441, HC (refd)

Council of Civil Service Unions v Minister for the Civil Service [1985] AC 374, HL (refd)

Koon Hoi Chow v Pretam Singh [1972] 1 MLJ 180; [1972] 1 LNS 56 (refd)

M&W Zander (M) Sdn Bhd v Director General of Inland Revenue [2005] 6 CLJ 336, HC (refd)

Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2011] 2 MLJ 457; [2011] 1 BLR 32, FC (refd)

Samarth Transport Co (P) Ltd v Regional Transport Authority, Nagpur and Others AIR 1961 SC 93, SC (refd)

Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd [1995] 2 MLJ 442, SC (refd)

Wee Choo Keong v Ketua Pengarah Perkhidmatan Awam, Malaysia [2010] MLJU 1097; [2011] 3 CLJ 331, HC (refd)

Workon Sdn Bhd v Director of Lands & Surveys, Sabah [1999] 4 MLJ 177, HC (refd)

Legislation referred to

Rules of the High Court 1980 O 53 r 2(4)
Specific Relief Act 1950 s 44
Trade Unions Act 1959 ss 12(1), (2), 71

Appeal from: Civil No 25NCVC-95–12 of 2011 (HIgh Court, Ipoh)

VK Raj (P Kuppusamy & Co) for the appellant.
Muzila bt Mohamed Arsad (Senior Federal Counsel, Attorney General's Chambers) for the respondent.

Hamid Sultan JCA (delivering judgment of the court):

[1] This is our judgment in respect of the appellants/applicants whose application for leave to apply for judicial review and obtain an order of certiorari and/or mandamus was refused by the High Court. We heard the appeal on 13 December 2012 and dismissed the same with costs. My learned

sister Zaharah Ibrahim JCA and brother Mohamad Ariff Md Yusof JCA have read the judgment in draft form and approved the same. This is our judgment.

[2] In the instant case it is not in dispute that a decision as required by O 53 r 2(4) of the Rules of the High Court 1980 is not in place. Order 53 r 2(4) states:

> Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.

[3] What the appellant has received is a letter from the relevant authority stating that the decision on the appellant's application is going to be deferred. The learned senior federal counsel argues the said letter stands only as a notification and in consequence does not attract O 53 r 2(4) to provide the locus for the appellant to commence the judicial review proceeding. It is also the contention of the respondent that the appellant's have not exhausted alternative remedies.

[4] There are authorities to suggest that a decision by a public authority is not a pre-requisite for judicial control of administrative action, (see *Wee Choo Keong v Ketua Pengarah Perkhidmatan Awam, Malaysia* [2010] MLJU 1097; [2011] 3 CLJ 331. In *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, Lord Diplock at p 408 had this to say:

> Judicial review, now regulated by RSC, O 53, provides the means by which judicial control of administrative action is exercised. The subject matter of every judicial review is a decision made by some person (or body of persons) whom I will call the 'decision-maker' or else a refusal by him to make a decision.

It all depends on the facts, circumstances and in case where public interest is involved the urgency of the matter for the court to act and arrest any excesses by issuing the prerogative writs of certiorari or mandamus or prohibition, quo warranto, habeas corpus, etc as the case may be; and/or provide interim orders and/or directions even at leave stage provided the court is satisfied the application is not frivolous, vexatious and/or abuse of process of court.

BRIEF FACTS

[5] By a letter dated 8 August 2011 Employees Union of Carsem (M) Sdn Bhd made an application to the respondent to register the union as an in house union. By a letter dated 10 November 2011 the respondent stated that the application made by the union was postponed until the disposal of an application for the recognition by the 'Kesatuan Sekerja Industri Elektronik Wilayah Barat Semenanjung Malaysia'.

[6] It must be noted that s 12(2) of the Trade Unions Act 1959 makes it clear that the director general may refuse to register a trade union when there is an existence a trade union representing the workmen. The said section reads as follows:

> The Director General may refuse to register a trade union in respect of a particular establishment, trade, occupation or industry if he is satisfied that there is in existence a trade union representing the workmen in that particular establishment, trade, occupation or industry and it is not in the interest of the workmen concerned that there be another trade union in respect thereof.

[7] Further the Act itself provides the avenue for the appellant to appeal to the Minister should the appellants be dissatisfied with the respondent's decision (see s 71).

THE APPELLANTS' SUBMISSION

[8] The appellants complaint:

(a) that the learned High Court judge acted beyond his jurisdiction when he considered the merits of the case at the leave stage. And relies on the Supreme Court decision of *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228 where Ajaib Singh J (as he then was) on the facts stated:

> Leave to appeal for an order of certiorari ought to have been given in this case. The learned judicial commissioner in his grounds of judgment had gone further than the leave stage and embarked on substantial issues on merits. This was not the right approach when the application for leave to apply for an order of certiorari is made.

(b) the fact that the learned High Court judge decided that mere was no decision made amounts to having gone to the merits of the case and the issue and that issue can only be dealt with at inter parte stage;

(c) the director general can only make one of two decisions under s 12(1) or refuse to register under s 12(2) and has no provision to defer the decision, until the claim for recognition by another union is resolved. And relies on a passage of the (9th Ed), of GP Singh's *Principle of Statutory Interpretation* where it was stated:

> When a capacity or power is given to a public authority, there may be circumstances which couple with the power a duty to exercise it, or the manner in which it may be only exercised. In other words the legal and factual context in which the power is to be exercised may combine the power with an obligation to exercise even though it is conferred by use of the word 'May' …

> It was further pointed out by Lord Cairns: 'where power is deposited with a public officer for the purpose of being used for the benefit of persons specifically pointed out with regard to whom a definition is supplied by the Legislature of the conditions upon which they are entitled to call for its exercise, that power ought to be exercised and the Court would require it to be exercised'. Lord Blackburn stated in the same case: 'the enabling words are construed as compulsory whenever the object of the power is to effectuate a legal right'. In the words of Beg J.: If the conditions in which the power is to be exercised in particular cases are also specified by a statue then, on the fulfilment of these conditions, the power conferred become annexed with a duty to exercise in that manner …
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> In holding so, Shah J., observed: 'even if the words used in the statue are prima facie enabling the Courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right — public or private — of a citizen'.

(d) the director general has taken into account an irrelevant consideration because the claim for recognition by the other union has nothing to do with the registration of the in-house union. In consequence the application is not frivolous, or vexations and/or abuse of process of court to refuse leave as advocated in a number of cases.

THE RESPONDENT'S SUBMISSION

[9] The learned senior federal counsel asserts:

(a) the appellant did not satisfy the threshold test as set out by the Federal Court in *Tuan Hj Sarip Hamid & Anor v Patco Malaysia Bhd* [1995] 2 MLJ 442 where at p 449 it was stated:

> The judge should grant leave if it is clear that there is a point for further investigation on a full inter parte basis with all such evidence as is necessary on the facts and all such argument as is necessary on the law.
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> If the judge is satisfied that there is no arguable case he should dismiss the application for leave to move for judicial review.
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> If on considering the papers, the judge comes to the conclusion that he really does not know whether there is or is not an arguable case, the right course is for the judge to invite the putative respondent to attend and make representations as to whether or not leave should be granted. That inter parte leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The test to be applied by the judge at that inter parte leave hearing should be analogous to the approach adopted in deciding whether to grant leave to appeal against an arbitrator's award, … namely: if, taking account of a brief argument on either side, the judge is satisfied that there is a case fit for further consideration, then he should grant leave.

And at p 443 that:

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> The order for leave to apply for a certiorari should also be set aside on the further ground that the respondent was bound to fail had there been a substantive inter parte application for certiorari, as there was absolutely no arguable case in respect of the respondent's application.

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(b) there is in fact and law no arguable case and the grant of leave which is only a discretionary relief was rightly refused. And relies on the Supreme Court case of *Association of Bank Officers, Peninsular Malaysia v Malayan Commercial Banks Association* [1990] 3 MLJ 228 where it was stated:

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> The guiding principles ought to be that the applicants must show prima facie that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application.

And also relies on the case of *Bandar Utama Development Sdn Bhd & Anor v Lembaga Lebuhraya Malaysia & Anor* [1998] 1 MLJ 224, where Visu Sinnadurai J stated:

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> The court, in exercising its discretion that an application for leave be granted, must be convinced by the applicants that prima facie the application is genuine and that there is some substance in the grounds supporting the application. The test's threshold is very low; a prima facie case of reasonable suspicion, an arguable case must be shown, not a prima facie case. Additionally, an application will fail if it is frivolous, vexatious, misconceived, made by busybodies with misguided or trivial complaints of administrative errors, groundless, where there are more appropriate alternative remedies, and where the application for judicial review is inappropriate.

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(c) the impugned letter is not a decision as advocated in O 53 r 2(4) of the RHC 1980 as the appellants' cannot be said to be adversely affected by the said letter. The appellants' rights can only be affected once the respondent makes a decision either to register or not to register (see *Abdul Rahman bin Abdullah Munir & Ors v Datuk Bandar Kuala Lumpur & Anor* [2008] 6 MLJ 704). And relies on the case of *M&W Zander (M) Sdn Bhd v Director General of Inland Revenue* [2005] 6 CLJ 336, where Clement Skinner J (as he then was) stated:

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> Reverting to the issue at hand, in my judgment it must follow that unless the applicant can show that the director general has made a 'decision' within the meaning of that word in sub-r (4) of O 53 r 2, the applicant does not pass the threshold test because the applicant cannot then be said to have an arguable case which needs further investigation on a full inter-partes basis, nor does it have a sufficient interest since it is not 'adversely affected' by the decision of a public authority.

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(d) the threshold requirement for mandamus has not been satisfied as there is no arguable case and in consequence the appellants' case is frivolous, vexatious and abuse of process of court. And relies on the case of *Koon Hoi*

Chow v Pretam Singh [1972] 1 MLJ 180; [1972] 1 LNS 56 where Sharma J held that the five conditions set out in s 44 of the Specific Relief Act 1950 which are cumulative must be fulfilled;

(e) in reliance of the case of *Workon Sdn Bhd v Director of Lands & Surveys, Sabah* [1999] 4 MLJ 177 says mandamus lies only in relation to duties and not discretionary powers. And relies on the case of *Koon Hoi Chow* where Sharma J said:

> Proviso (b) requires that the doing or forbearing must be clearly incumbent on the person in his public character. There must be under the law some duty cast upon the public officer. If he does not do the duty, then the court will call upon him to perform that duty.

And also relies on a passage from MP Jain *Administrative Law of Malaysia and Singapore* (3rd Ed), where at p 653 it was stated:

> Mandamus can be granted only when (i) a legal duty is imposed on an authority, and it does not perform the same; and (ii) the applicant has a legal right to compel the performance of the public duty prescribed by law. Mandamus is thus a very wide remedy which is available against a public officer to see that he does his duty, or act according to law.
>
> What can be enforced through mandamus is a duty of public nature, the performance of which is imperative and not optional or discretionary with the authority concerned. Thus, if an officer has power, rather than a duty, and if he does not use his power, mandamus is not issued to compel him to exercise his powers.

(f) complains that the appellants have not exhausted alternative remedy. And relies on the Federal Court case of *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2011] 2 MLJ 457; [2011] 1 BLR 32, where the Federal Court stated:

> (3) Section 71A of Act 262 provides a remedial mechanism that is a specific procedure for an appeal to the Minister. Act 262 has established a second tier. Since legislation has identified a specific procedure through an appeal to the Minister, any employer wishing to refute union recognition has to resort to the mandatory established by statute. Courts are not authorised to interfere since the statutory right is not formal but mandatory. The statutory right has to be exhausted.

In the later part of the judgment Heliliah Mohd Yusof FCJ said:

> [17] In our opinion the legislation by stipulating that the decision of the Minister is to be final is itself indicative that when there is already stipulated a second tier identified in the legislation, courts are not authorised to interfere for the statutory right that has accrued is not purely formal but mandatory. In other words the statutory right has to be exhausted.

A [18] In filing this action, the appellant is seeking the court's intervention in what could be described as the intermediate stage.

[10] We have read the appeal record and the submission of the parties in detail. We are grateful for the comprehensive submission. We do not wish to repeat the same save to deal with the core issues. After having given much consideration to the appellants' submission, we take the view that the appeal must be dismissed with costs. Our reasons, inter alia, are as follows:

(a) it is trite that judicial review is nothing but a potent and effective procedural device within the armoury of the High Court to supervise and control the decision making process of public bodies or like to ensure that they act within the spirit and powers of the Federal Constitution and/of statutes and if necessary to restrain the decision maker from acting in excess and/or abuse of power. This process is also used to check and arrest executive excesses and encroachment (see *Chong Chung Moi @ Christine Chong v The Government of the State of Sabah & Ors* [2007] 5 MLJ 441). The court's themselves have placed various restrictions to control exodus of complaints against public bodies by busy bodies and alike, or where the complaint is premature or trivial or misconceived as in the instant case. The development of the law in this area of jurisprudence will clearly show that the goal post for obtaining the relief has often been moulded from time to time and is not seen as a static concept. If judicial fetters are employed, it is only for the purpose of stopping busy bodies or premature claims, who ultimately cannot be given any form of relief and from disturbing the courts and the workings of the government and public bodies. And no one case is binding on another for courts intervention when the issue relates to fundamental guarantees and/or public interest as a whole. It all depends on the factual matrix of the case, public interest and urgency for the courts intervention even though there may be room to argue that intervention may be premature;

(b) failure to make decision by public bodies within a reasonable time may be a subject matter of judicial review, as advocated in the Indian Supreme Court of *Samarth Transport Co (p) Ltd v Regional Transport Authority, Nagpur and Others* AIR 1961 SC 93. K Subbarao J had this to say:

> A statutory tribunal is expected to discharge its functions fairly and without bias even in a case where the interests of the government are involved. Considering the facts and circumstances of this case, we cannot say that the complaint of the petitioner that the adjournments were not for the reasons mentioned in the orders but were only to give time to enable the government to approve the scheme, may not be wholly unjustified.

(c) the instant case is one which will fall within jurisprudence of frivolous, vexatious and abuse of process of court, for in the instant case (i) no

decision has been made; (ii) the applicants have not demonstrated in the affidavit of the prejudice for failure to have the decision made promptly; (iii) no reason given why appeal mechanism provided under the Act has not been complied with.

[11] We do not think this is a fit case to issue mandamus and also the appellants have not satisfied the threshold requirement to provide this relief as advocated by the learned senior federal counsel.

[12] We agree with the learned counsel for the respondent that the appellants' appeal has no merits and ought to be dismissed in limine. In consequence the appeal is dismissed with costs.

[13] We hereby order so.

Appeal dismissed with costs.

Reported by Afiq Mohamad Noor